filed 8-24-81

No. 81-5157

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

WESLEY H. PEERY,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

IN OPPOSTION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEBRASKA

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I.

OPINION BELOW

The opinion here questioned by the petitioner is State of Nebraska v. Wesley H. Peery, 208 Neb. 639, ___ N.W.2d ___ (1981), which arose as a post conviction action by the petitioner. The petitioner's direct appeal was State v. Peery, 199 Neb. 656, 261 N.W.2d 95 (1977), cert. denied, 439 U.S. 882 (1978).

II.

JURISDICTION

Pursuant to Nebraska's Post Conviction Relief Act, Neb.Rev.Stat. §29-3001 (Reissue 1979), petitioner perfected an appeal to the District Court of Lancaster County, Nebraska. The district court denied petitioner's motion for post conviction relief. On April 24, 1981, the Supreme Court of the State of Nebraska affirmed the district court decision.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondent accepts the petitioner's statement of the constitutional provisions involved. The respondent believes the following state statutory provisions to be involved:

Neb.Rev.Stat. §29-2521.01 (Reissue 1979)
Neb.Rev.Stat. §29-2521.02 (Reissue 1979)
Neb.Rev.Stat. §29-2521.03 (Reissue 1979)
Neb.Rev.Stat. §29-2521.04 (Reissue 1979)
Neb.Rev.Stat. §29-3001, et seq. (Reissue 1979)

IV.

QUESTIONS PRESENTED

The respondent accepts the petitioner's statement of the questions presented.

V.

STATEMENT OF THE CASE

Wesley H. Peery was found guilty of murder and robbery by force, and sentenced to death. The Nebraska Supreme Court reviewed and affirmed the petitioner's death sentence. This

Court denied the petitioner's application for writ of certiorari on October 2, 1978.

The petitioner perfected an appeal to the District Court of Lancaster County, Nebraska, pursuant to the Nebraska Post Conviction Relief Act. That court denied the assertion that the petitioner's constitutional rights of due process and equal protection were impaired by use of the statutory procedures of homicide cases as set forth in Neb.Rev.Stat. §29-2521.01 to §29-2521.04 (Reissue 1979). The Nebraska Supreme Court affirmed that decision.

VI.

ARGUMENT

A.

THE RESPONSIBILITY FOR INTERPRETING STATE LEGISLATIVE ENACTMENTS RESTS WITH THE STATE COURTS.

This Court is not the forum in which to resolve questions concerning the interpretation of state legislative enactments such as Neb.Rev.Stat. §29-2521.01, et seq. (Reissue 1979). The responsibility for the interpretation of state legislative enactments rests with the state courts. The only issue which may be of such consequence as to possibly merit consideration in this forum is the question of whether the sentence of death imposed upon the petitioner by the courts of the STate of Nebraska was in any manner imposed in violation of the Constitution. The statutory scheme of the State of Nebraska employs numerous safeguards to aid the sentencing court in properly determining whether the penalty of death is appropriate. We believe that system to be constitutionally adequate and that the petitioner has not been denied the benefits of that system

B.

THE DEATH PENALTY IMPOSED IS CONSTITUTIONAL

As the petitioner recognizes, both the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976) and the Nebraska Supreme Court in State v. Rust, 197 Neb. 528, 250

N.W.2d 867 (1977); State v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979); and State v. Anderson and Hochstein, 207 Neb. 51, 287 N.W.2d 671 (1980), have all expressly held that the death penalty is not per se cruel and unusual. This question has been settled.

Petitioner also quite correctly points out that the Nebraska Legislature enacted LB 711 in order to guarantee the even-handed imposition of the death penalty as directed by this Court in Gregg, supra, and Furman v. Georgia, 408 U.S. 238 (1972). This Court in Proffitt v. Florida, 428 U.S. 242 (1976), upheld the Florida death penalty statutes which are, in all relevant aspects, identical to Nebraska's. This Court specifically stated that such statutes provide all the safeguards required by Furman v. Georgia, 408 U.S. 238 (1972).

CONCLUSION

For the foregoing reasons the respondent respectfully urges this court to deny certiorari in this case.

STATE OF NEBRASKA,
Respondent

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CERTIFICATE OF SERVICE

I, Terry R. Schaaf, Assistant Attorney General of the State of Nebraska and a Member of the Bar of the Supreme Court of the United States, hereby certify that a copy of the Brief in Opposition to petitioner's Petition for Writ of Certiorari has been served on the petitioner by mailing said copy, first

class postage prepaid, addressed to his attorney of record, Mr. Stanley D. Cohen, 4720 Meredeth, Lincoln, Nebraska 68506.

Dated this _____ day of August, 1981.

Terry R. Schaaf
Assistant Attorney General

Member of the Bar of the Supreme Court of the United States